

SHEEHAN PHINNEY

Manchester, NH | Concord, NH | Hanover, NH | Boston, MA

Direct Dial: 603-627-8188
rlucic@sheehan.com

Reply to: Manchester Office
1000 Elm Street, 17th floor
Manchester, NH 03101

April 25, 2018

Sharon E. Kivowitz, Esq.
Assistant Regional Counsel
Office of the Regional Counsel – Region 2
United States Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007-1866

**Re: Administrative Order for a Remedial Design Index No. CERCLA-02-2018-2015;
New Cassel/Hicksville Contaminated Groundwater Superfund Site, OU1**

Dear Ms. Kivowitz:

On behalf of IMC Eastern Corporation (IMC) and Island Transportation Corp. (ITC), we submit the following written comments to the Unilateral Administrative Order (UAO) issued by the United States Environmental Protection Agency (USEPA) on March 22, 2018 in the above-captioned matter and in light of the new data provided by USEPA and the Frost Street Parties after the April 17, 2018 conference. USEPA also indicated at the conference that the new data from the Army Corps. Of Engineers (ACOE) raised new questions regarding the potential extent and impacts of contamination from OU2 within OU1. IMC and ITC have repeatedly presented their position, consistent with the conclusions of New York State Department of Environmental Conservation (NYSDEC), that the Western Plume, to the extent it exists at all (which IMC and ITC dispute), is small, shallow and flows in a generally southwesterly direction. The Western Plume has minimal if any impacts on OU1. IMC and ITC should not be considered Responsible Parties at the New Cassel/Hicksville Contaminated Groundwater Superfund Site (Site), or at most *de minimis* parties that have not contributed contamination to OU1 in any amount that would require remediation and for which there is no complete pathway of human exposure.

Since its proposed listing of the Site to the National Priorities List (NPL) in 2011, IMC and ITC have submitted substantive comments separately and jointly to USEPA on no less than eight occasions (Appendix 2 through 10). Despite IMC and ITC's detailed comments, to date USEPA has inexplicably refused to substantively address the

concerns raised other than to state simply that USEPA disagreed with IMC's and ITC's comments even though all of the data collected to date confirms IMC's and ITC's position. This includes the new data from OU3 shared with the Potentially Responsible Parties (PRPs) after the April 17, 2018 conference which support our comments regarding USEPA's Conceptual Site Model (CSM) and raises substantial questions about the adequacy of the site characterization conducted to date. None of the data collected show any extended plume from the Western Plume. Indeed, USEPA did not even sample in OU3 in the flow direction of the Western Plume. Instead it found significant contamination at depth and downgradient from the coningled Eastern and Upgradient Plumes. USEPA continues to ignore data related to the Site in order to salvage an arbitrary and incorrect CSM. Rather than step back and address the clear data gaps that it acknowledged exist and the questions raised by these new data, USEPA has issued orders requiring the NCIA PRPs to undertake costly pre-design and design of a remedy that will not work.

USEPA's failure to seriously consider IMC and ITC's comments is illustrated by the extensive comments filed in response to the Proposed Remedial Action Plan (PRAP). Those comments (along with extensive joint comments) were submitted to USEPA on September 23, 2013 (Appendix 4 and 5). The Record of Decision (ROD) was issued one week later with only a cursory response to the major flaws pointed out by the PRPs.

The fundamental flaw repeatedly raised by IMC and ITC is that USEPA's CSM is incorrect. USEPA's refusal to account for the considerable data and analyses generated at the Site since the early 1990's by the NYSDEC and the PRPs has undermined all of the agency's decisions dating back to the initial NPL listing through the failure to undertake a Remedial Investigation [and Feasibility Study].

The error has perpetuated itself in all of the subsequent decision documents at the Site despite IMC's and ITC's repeated warnings. Worse, IMC offered to provide USEPA the entire data set compiled by its consultant Gradient. That database compiled over 7,400 soil and groundwater samples collected from over 1,100 locations from within or adjacent to the NCIA, OU1 and the upgradient plume. USEPA never followed up on the offer and as a result USEPA has essentially ignored decades of data collected at the Site consisting of over 2,500 groundwater samples from locations within the NCIA, over 150 groundwater samples from OU1 and over 2,500 groundwater samples collected from locations in the upgradient plume.

In addition to ignoring reams of data, USEPA also failed to implement the recommendations of its own consultant, Lockheed Martin, who had conducted an analysis and identified several critical data gaps that had to be filled in order to characterize conditions at the Site. USEPA selectively relied on certain sampling data, while arbitrarily ignoring other available sampling data and overlooking the absence of sampling data, where data were required. USEPA has continued this conduct with respect to the most recent data from the ACOE related to OU2 and its own data related to OU3.

USEPA's flawed CSM resulted in distorted conclusions as to the size and location of the plumes emanating from the NCIA into OU1. The Eastern Plume, based on all data collected at the Site is far larger than that depicted in Appendix 2 to the UAO. Simple logic alone would lead anyone to question USEPA's depiction of the Eastern Plume given the concentration of contaminants released there in comparison to the other sources.

As set forth repeatedly in IMC and ITC's comments, the historical data show that the Western Plume was small, shallow and had largely attenuated by the time USEPA took over the Site in 2011. See Joint Comments re Proposed Listing on NPL May 9, 2011 (Appendix 3). IMC and the owner of 299 Main Street had completed onsite source removal by approximately [2004] thus cutting off any further contamination feeding the dissipating plume.

In contrast, it is not clear whether the source control in the Eastern Plume is even now complete in 2018. In depicting the western extent of the Eastern Plume, USEPA relied on a single data point, MW-15. This well, screened from 185 to 205 feet BGS, was sampld only once and is the entire basis for USEPA's conclusion as to the western extent of the Eastern Plume.¹

This arbitrary reliance on a single data point is not only a concern of IMC and ITC as Western Plume Parties. In April 2016, Jeffrey Dyber, then Environmental Engineer II for NYSDEC and the New York State contact for OU1 and project manager for four State hazardous waste disposal sites, testified at a trial between the State of New York and Next Millenium Realty, LLC et al in the federal court for the Eastern District of New York.²

Mr. Dyber was asked:

Q. Did you participate in responding to the comments to the PRAP in this case?

A. I believe that the EPA sent us their comments and proposed responses and we looked at them.

THE COURT: The question was did you, you –

THE WITNESS: Yes, I, when they sent me their comments and proposed responses.

THE COURT: Who is "they," sir.

¹ See USEPA Response to Comments September, 2013 (OU1 ROD), #3 and #4 (p. 3-4 of Appendix V, see PDF p. 76-77).

² State of New York v. Next Millenium Realty, LLC et al, Case No. 06-cv-1133 (E.D.N.Y.).

THE WITNESS: The EPA sent me their comments and proposed responses and I looked at them.

Q. Mr. Dyber, I'll ask you to look at comments three and four in the ROD.

A. Okay.

THE COURT: Let us know when you have your answer. Are you done?

THE WITNESS: It's been a long time.

THE COURT: All right.

THE WITNESS: I'm sorry. I'm almost done.

THE COURT: Maybe you can bring up three and four.

THE WITNESS: Okay, I've read those comments.

THE COURT: Do you agree with those comments?

Q. First, did you participate in preparing the responses to those comments?

A. My memory was I reviewed, looked at their responses.

Q. Did you agree with the EPA's responses?

A. Did I agree at the time? I'm not certain. I'm not certain whether I had any – whether at the time I had any comments on their comments.

Q. Do you presently agree with those comments?

MR. MULVHILL: Objection. Kind of a compound question. Two comments. There's a lot of facts. Each comment has a number of different facts in them. It's kind of a blanket question.

THE COURT: Forgive me. Is there anything in either of those two comments that today you would disapprove? Is that the question?

MR. MALDONADO: That is the question, your Honor.

A. The one thing that leaps out at me was the sentence, lack of contamination detected, the lack of contamination detected at MW-15 also supports the conclusion that the OU-1 eastern groundwater plume is separate from the OU-1's central plume and the groundwater flow is toward the south southwest.

The rest of it I agree with, but that MW-15 supports that conclusion. That's the thing that leaps out at me.

Q. Why do you disagree with that?

THE COURT: Well, he didn't say he disagrees with it. It leaps out at him.

Q. How does it leap out at you?

A. I think there may be between the eastern and central plumes.

Q. Based on what data, sir?

A. Couple of things. First of all, HDR in most of the reports they gave us, stated that the plumes overlap at the edges, so that is something that may indicate that, and they took the data and that was their interpretation of the data.

Obviously the fact that MW-15 is at one depth and was only sampled once during all our investigations. So that makes it – that to me makes – is an indication to pause as to whether that one sample at that one depth is the basis of a separation between the plumes or a clean separation between the plumes.

Obviously some of the maps that you showed me from the ROD had showed commingling between the plumes in the past. So those are the general, those are my general concerns with that statement.

Transcript attached hereto as Appendix 1.

The UAO, Statement of Work and Pre-Design Work Plan make no provision for addressing this basic flaw in characterizing the Site. To the contrary, the SOW and Work Plan set forth predetermined sampling locations that are not designed to properly characterize the plumes. USEPA's recent data from OU3 confirms this.

During the course of negotiations of an administrative order, IMC and ITC proposed additional sampling locations to ascertain the western extent of the Eastern Plume, a proposal that was rejected by the Eastern Plume Parties. IMC's and ITC's recommendations are not included in the SOW and Work Plan.

USEPA's unwillingness to examine the western/southwestern groundwater flow at the Site is truly puzzling. The NCIA parties have repeatedly objected to USEPA's refusal to include parties from OU2 in any response related to OU1.


The only response USEPA has given to try to allay the concerns raised by IMC and ITC is that those concerns can be addressed during the Pre-Design Investigation (PDI). The PDI ordered by USEPA for OU1 is by its nature insufficient to address the fundamental flaws in the CSM. Given the glaring mischaracterization of the Site, the PDI as conceived here gives no incentive to the major contributors at the Site (which are not IMC or ITC) to fully investigate the extent of their off-site plumes. This is especially true in light of the substantial contamination detected at depth in the eastern portion of OU3, which indicates the extent of the OU1 Eastern Plume is necessarily far greater than depicted in the ROD.

The NCIA Parties (including IMC and ITC) have provided USEPA data that show that the western extent of the "Upgradient Plume" is not defined and likely impacts OU-1 substantially. USEPA has simply ignored the data provided and offered no technical basis for refusing to require those parties from participating in the OU1 RD. See letter to USEPA from IMC February 19, 2015 (Appendix 12.).

IMC and ITC request that USEPA withdraw the UAO in its entirety and conduct a full Remedial Investigation not based on arbitrary determinations of plume characteristics. If the Agency refuses to do so, IMC and ITC request that they be removed from the list of Potential Responsible Parties at OU1.

Very truly yours,


for Robert R. Lucic


for Sheila A. Woolson

Encls.